IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

BRIEF OF PETITIONER

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OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 138 Ga. App. 530, 227 S.E.2d 65. It is also set forth in Appendix A to the Petition for Writ of Certiorari as well as at pages 19 through 25 of the Joint Appendix.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on April 6, 1976. An application for rehearing was timely filed and denied on May 6, 1976. The Georgia Supreme Court denied a timely filed petition for writ of certiorari on July 9, 1976. Mr. Justice Powell granted an extension of time to and including December 6, 1976 within which to file a petition for writ of certiorari. The petition was filed on December 3, 1976, and it was granted on January 25, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code §1257 (3).

QUESTIONS PRESENTED

1. Whether a jury composed of five persons is sufficient to afford an accused in a criminal prosecution to the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a standard of *scienter* which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of expression protected under the First and Fourteenth Amendments to the United States Constitution.

3. Whether the motion picture film "Behind the Green Door" is, as a matter of applicable constitutional law, protected expression under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth and Fourteenth Amendments to the United States Constitution as well as Article VI, Section XVI, of the Georgia Constitution are set forth in Appendix D to the Petition for Writ of Certiorari. Article VI, Section XVI, of the Georgia Constitution is also set forth at page 27 of the Joint Appendix.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County for distributing obscene material, the charges being predicated upon exhibition of the motion picture film "Behind the Green Door" at an Atlanta theatre where petitioner was employed. He was tried, over objection, before a five-person jury and convicted. He was sentenced to a one-year term of imprisonment and a fine of $2,000.00. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial court judgment in all respects in a judgment and opinion for which review is sought here.

ARGUMENT

I.

A JURY COMPOSED OF FIVE PERSONS IS INSUFFICIENT TO AFFORD AN ACCUSED IN A CRIMINAL PROSECUTION THE RIGHT TO TRIAL BY JURY GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Sixth Amendment guarantee of trial by jury in criminal cases, made applicable to the states through the Fourteenth Amendment, does not require trials before twelve-person panels. While approving six-person juries, the Court in *Williams* left open the question of what minimum number of jurors is required to guarantee the constitutional right to jury trial in state criminal cases. 399 U.S., at 91 n.28. That is the first question before this Court in the instant case.

The decision in *Williams, supra,* was predicated upon an analysis of the purpose of jury trials and a finding that the purpose was not frustrated by a reduction in the size of the jury from twelve to six persons. Petitioner suggests that the question now before the Court should be answered on the same basis of analyzing the purposes of jury trials and determining whether those purposes can be adequately fulfilled by five-person panels. It is respectfully submitted that, especially in obscenity cases involving a determination of local community standards, no jury of five or fewer persons can adequately carry out the purposes of the jury trial as a guaranteed constitutional right.

It must first be noted that there is an important distinction between trials for robbery such as that in *Williams, supra,* and trials for obscenity offenses such as the instant case. This distinction was noted by Petitioner at an early stage when he moved to impanel a twelve-person jury. In arguing the motion, counsel for Petitioner stated:

> "The Solicitor has chosen to proceed in this Court which only allows five-person juries to try a case. And we think, given the fact that in obscenity cases the issue of contemporary community standards and a cross-section of the community must be properly applied in order to afford defendant a fair trial, given a cross-section of the community, a twelve-man jury would be more proper.
>
> "I know the United States Supreme Court has allowed a minimum, the bottom of six-person juries. I think that the five-man jury in and of itself is subject to attack. But in light of these circumstances, I think that a five-man jury is even less proper because of the subjective evaluation and standards, and adequate cross-section.
>
> "We don't have, did a man pull a trigger. Did a man shoplift. But we have to apply this contemporary community standards regarding sex, nudity, excretion, etc." Tr., at 14.

In light of the unique task confronting a jury in any obscenity case, any decrease in the number of jurors performing that task effects not only determinations of guilt or innocence, but also implicit enunciations of contemporary community standards.

In *Miller v. California*, 413 U.S. 15 (1973), this Court eliminated the requirement of national standards and the determination of obscenity to be determined against the background of local community standards as viewed by the average person. The purpose of this standard was stated by the Court to be that:

> "So far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one." 413 U.S., at 33.

The necessity of obtaining an adequate cross section of the community is thus heightened in obscenity cases in order to obtain a more reliable reflection of the views of the "average person" in the community rather than particularly susceptible or totally insensitive citizens.

The determination of local community standards as viewed by the average person is, by definition, an averaging process. In this regard, juries may be viewed, in a statistical sense, as a sample group from which one is to judge the average views of the community at large. It is axiomatic that the ability of this sample group to accurately reflect the total population is directly proportional to the size of the sample. With each decrease in size, there is an increase in the likelihood of judging any material by a small group containing, by chance, highly susceptible and/or totally insensitive persons. The smaller the group, the larger the voice of such minority viewpoints.

The quality of jury decisions in obscenity cases as truly representative of the views of the community as a whole will be increased as the number of jurors making the decision is increased. It has thus been noted that:

> "The greater representativeness of the larger groups results from the obvious fact than an individual with a given characteristic is more likely to appear in a random collection of twelve individuals than any random collection of six. Thus, the presence of jurors with viewpoints, abilities, quirks, or racial identities that characterize only a minority of the population is more likely with larger juries." Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643, 668 (1975).

Since it is axiomatic that larger randomly selected groups tend toward greater heterogeneity of membership, a six-person jury is better able than a five-person jury to accurately reflect the views of a heterogeneous community. The difference between five-person deliberations and six-person deliberations might seem small in the abstract. Viewed alternatively, however, increasing a jury from five to six persons increases the input in community standard determination by a full twenty percent. This is significant whenever sensitive First Amendment values are implicated. It is even more important since the *Williams* decision already reduced the constitutional minimum from twelve to six and each additional reduction brings us even further down the "slippery slope toward dispensing with the jury altogether" which was recognized in *Williams*. 399 U.S., at 91 n.28.

Quite apart from the unique First Amendment implications present in the instant case, it is submitted that

five-person juries are constitutionally inadequate to guarantee the right to trial by jury even as it relates solely to the determination of guilt or innocence in any criminal case. In approving the decrease from twelve to six-member juries in *Williams*, the Court noted its inability to find any "discernible difference between the results reached by the two different sized juries." 399 U.S., at 101. The theoretical advantage of larger juries in presenting a defendant with greater chances of finding a holdout for acquittal was dismissed by noting that larger juries also present the state with more chances of finding a holdout for guilt. *Id.*

While empirical data is limited, that which exists tends to repudiate the Court's unsupported assumption that any increase in holdouts associated with larger juries inures equally to the benefit of the state and the defendant. The only data available to Petitioner's counsel indicates that approximately twenty-five percent of all hung juries are caused by a single juror holding out for acquittal and almost no hung jury can be singled out as predicated upon one juror holding out for conviction. See, H. Kalven and H. Zeisel *The American Jury* (Little, Brown & Co., 1966). This evidence would appear to support the proposition that a decrease from six to five person juries will increase the number of guilty verdicts because of the decreased chance of the presence of a holdout for acquittal.

The Petitioner, however, does not merely rely upon empirical data supporting the proposition that larger juries inure to the benefit of defendants. What is more pervasive, and more in portant, is data supporting the proposition that the quality of group decisions is higher in larger than in smaller groups, regardless of whether that increase in quality

benefits the defendant or the state. The obvious advantage of larger group decision making over the small group decision making derives from the greater input of diverse viewpoints, the increase in individual contributions to the decision making process, and the greater heterogeneity of the decision making body.

The positive effect upon the quality of decision making achieved by increasing group size has been extensively studied. The advantages of larger groups stated above have been substantiated in over thirty studies in which the quality of the decision making was correlated to group size. These studies are summarized in Thomas and Fink, *Effects of Group Size*, 60 Psych. Bull. 371 (1963). The authors there conclude that:

> "It appears that both quality of group performance and group productivity were positively correlated with group size under some conditions, and under no conditions were smaller groups superior." *Id.*, at 373.

The studies supporting this conclusion are set forth in Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L.Rev. 643, 685 n.118. By refusing to take the further step down the "slippery slope" from six to five-person juries, the Court thus has an opportunity to promote the community interest in correct verdicts, quite apart from the defendant's interest in verdicts of acquittal. See, Lempert, *supra*, at 684.

The difference in the quality of the decision making and the difference in the outcomes produced when juries are decreased in size is especially important in light of the

premise underlying the *Williams* decision. The Court in *Williams*, unable to find significant historical guidance, proceeded solely upon an aanalysis of the purpose of jury trials:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

The Court authorized the decrease from twelve persons to six persons in *Williams* upon the supposition that no discernible change in outcome would result. All of the studies since that time have indicated not only that differences in outcome result but also that the quality of decision making is decreased.

A further purpose of the jury in our constitutional scheme was expounded upon by this Court in *Williams* as follows:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside

> attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence and the further ability to enunciate highly sensitive or totally insensitive personal values as the relevant local community standards in a sensitive First Amendment area.

II.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter*:

> "[T]he word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge

> of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." App. 10.

Petitioner objects to the above instruction to the extent that it authorizes a conviction predicated on mere "constructive" rather than actual knowledge.

The most recent pronouncement of this Court on the requirements of *scienter* is found in *Hamling v. United States*, 418 U.S. 87 (1974). There, this Court stated:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Consistent with the above statement from *Hamling*, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials distributed.

There is virtually no evidence at all in the record that Petitioner had any knowledge, constructive or otherwise, of the nature, character or contents of the film with which he is charged. The only evidence at all relating to this issue is a statement by another employee that Petitioner is the manager of the theatre. There was no evidence whatever

that he had personally viewed the film, nor was there any evidence at all as to the general fare in the theatre.

Petitioner complains of the chilling effect upon the distribution of non-obscene but sexually oriented matter that a constructive knowledge standard of *scienter* must necessarily produce. It was precisely such a chilling effect which concerned this Court in its examination of the Los Angeles obscenity ordinance which completely dispensed with the *scienter* requirement. *Smith v. California*, 361 U.S. 147 (1959). As in *Smith*, Petitioner here complains of the self-censorship produced by the lowered *scienter* standard which will impose "a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S., at 153.

In dealing with the absolute liability obscenity ordinance in *Smith*, the Court noted that booksellers facing absolute criminal liability, without the necessity of proving any knowledge, would tend to restrict the books they sell to those which they have personally inspected. The Court further noted that the effect of such a law impinges upon the First Amendment rights of the public to have access to reading material as well as to the First Amendment rights of the distributor to make material available. In this regard the Court noted:

> "The bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of book shops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed." 361 U.S., at 153.

It must be conceded that the constructive knowledge prong of the Georgia *scienter* requirement now before the Court does not produce as pronounced a chilling effect as that which flowed from the absolute liability obscenity ordinance in *Smith*. But, though the impermissible chilling effect is not as great in the case at bar, it is nonetheless present. It is true that booksellers and movie purveyors facing the Georgia *scienter* requirement need not personally inspect all of the materials they purvey. The must, however, personally inspect a great percentage thereof at the risk that a jury might later conclude that the title to a book or movie or the cover of a magazine should have put them on notice and necessitated an inspection of the entire film or publication.

The covers of nearly every issue of *Playboy*, *Gallery*, *Penthouse*, *Oui*, *Playgirl*, *Hustler* and several other similar magazines are sexually oriented in some degree. A jury might well conclude that such covers, or even the general public's knowledge of the contents of such magazines, would put a reasonable and prudent bookseller on notice and thus charge him with constructive knowledge of the contents of each and every issue. The cautious bookseller, fearing such a conclusion by a jury, will remove all such publications from his stands until he has an opportunity to personally peruse them in their entirety. Such self-censorship would, as the Court described in *Smith*, *supra*, tend to "restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly." 361 U.S., at 154.

The same self-censorship would ensue with respect to any book or non-pictorial magazine which has any allusion

to sex or nudity in its title or on its cover. The best selling novel "Kinflicks" by Lisa Alther is hardly sexual but a cautious bookseller might note the fact that the title is an obvious word play from the slang terminology for pornographic films – skinflicks. A cautious bookseller would take it from his shelves until he read it since it is clear that the printed word alone is capable of characterization as obscene. *Kaplan v. California*, 413 U.S. 115 (1973). Due to the necessarily longer time required for complete review of books, the public's access to textual material would be even more restricted than its access to pictorial magazines.

With respect to films, this Court might recall its own exposure to the motion picture film "Carnal Knowledge" in *Jenkins v. Georgia*, 418 U.S. 153 (1974). After a viewing of the film by the Court, the judgment of conviction was unanimously reversed. The opinion of the Court stated that the motion picture film could not, as a matter of constitutional law, be found obscene. Despite the somewhat enticing title, the Court's opinion displays the extremely tame content of the film as follows:

> "While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." 418 U.S., at 161.

Despite its rather mild content, the title of the film would be sufficient to chill any exhibitor who might fear a jury determination that the title gave him "constructive" knowledge of the contents. Thus, despite the film's national critical acclaim which included an academy award nomination, the cautious exhibitor would refrain from booking the film and thus making it available in his area until he had a chance to personally peruse it in its entirety.

The hypotheticals set forth above amply demonstrate the impermissible chilling effect produced by the constructive knowledge instruction. Through it, every purveyor of presumptively protected First Amendment material is at the mercy of an unpredictable jury determination that some facet of the title or cover or label on the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it. By such a scheme, the self-censorship condemned in *Smith, supra,* surfaces once again:

> "The bookseller's self-censorship, compelled by the state, would be a censorship effecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U.S., at 154.

The Respondent herein will surely claim, as did the respondent in *Smith,* that the elimination of this lower *scienter* requirement will interfere with the legal regulation of obscene material because "booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity." 361 U.S., at 154. But what the Court said in *Smith,* is equally applicable here. The Court

there noted that the law is not impotent to explore the actual state of a man's mind. It was further noted that the state need not prove that a bookseller actually perused the material with which he is charged. Rather, it was held that "the circumstances may warrant the inference that he was aware of what a book contained, despite his denial." *Id.*

Thus, Petitioner does not contend that State may not prove his knowledge by circumstantial evidence. Rather, he merely contends that the knowledge proved, whether by circumstantial evidence or otherwise, must be actual rather than "constructive" knowledge. A properly instructed jury might well find that Petitioner "knew" the content of the film he exhibited whether or not he actually looked at it. Knowledge in this sense may be defined as a correct belief. It is with just this sort of knowledge that attorneys "know" that the new volume of United States Reports which just arrived in the mail contains opinions of the United States Supreme Court. They may be said to know this even before they personally inspect the volume.

Petitioner does not contend that he can escape criminal liability by refusing to review the material he distributes. If such were the case, some might refuse to review the material precisely because they "know" what they will find. In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal. Petitioner thus concedes that a properly instructed jury might find that he had actual knowledge of the contents of the film whether or not he personally viewed it.

What Petitioner does contend is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's *scienter* standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith, supra,* and the constructive knowledge standard must thus be found constitutionally infirm.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT IS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated in furtherance of the doctrine of independent appellate review which had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962).

The doctrine was again invoked by the Court in *Jacobellis v. Ohio,* 378 U.S. 184 (1964) and more recently in *Jenkins v. Georgia,* 418 U.S. 153 (1974). *Jenkins* involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sadomasochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other

books); *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

In its determination of this particular issue upon which the Court has granted certiorari, Petitioner would respectfully urge the Court to review the developments flowing from the landmark decisions in *Miller v. California*, 413 U.S. 15 (1973), and its companion cases. Petitioner would further respectfully urge the Court to reconsider those decisions in light of consequences which they have precipitated.

If the reformulation of obscenity standards in *Miller* was intended, at least in part, to simply the issues and alleviate judicial involvement in such determinations, the history since *Miller* has clearly shown the contrary to be the case. Only one year after the pronouncement, the Court found itself once again mired in what Mr. Justice Harlan

referred to as "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (Harlan, J., concurring and dissenting). Many members of the Court can well recall that, in order to determine the issue presented in *Jenkins*, the Court was required to screen the film "Carnal Knowledge" and make an independent determination of its alleged obscenity. This development has given credence to Mr. Justice Brennan's prediction that, even under the *Miller* test:

> "One cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards have pronounced it so." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

The impact of these landmark decisions upon the judiciary was once again brought to the Court's attention in *Marks v. United States*, U.S. (No. 75–708, decided March 1, 1977). In *Marks*, the Court had before it the question of whether the doctrine of independent appellate review necessitates an actual viewing of materials found obscene at the trial level. The Solicitor General, confessing error, conceded that such an actual review is necessary at least at the initial appellate stage. While the Court found it unnecessary to expressly address this issue, it did refer to the Court of Appeals' characterization of the materials, made without an actual viewing, as "of dubious value." U.S. , n.11.

Even the requirement of a single level of actual review, especially in cases involving motion picture films and full length books, places an incredible strain upon the rare resources of judicial time and energy. Because of the

widespread concern over our presently overworked judiciary, Petitioner respectfully urges the Court to re-examine the earlier decisions in light of the substantial stress thereby placed upon an already overworked judicial structure. As Mr. Justice Brennan stated in *Jenkins, supra*:

> "Because of the attendant uncertainty of such a process [appellate review of allegedly obscene materials] and its inevitable institutional stress upon the judiciary, I continue to adhere to my view [as to the constitutionality of obscenity laws]." 418 U.S., at 165 (Brennan, J., dissenting).

If a reconsideration of its 1973 pronouncements is to be undertaken by the Court, it is important to note the state of the record below. There is no evidence whatever that either Petitioner or the theater which employed him engaged in the distribution of any materials to juveniles or the exposure of any materials to unconsenting adults. To the contrary, they were merely engaged in a business described by Mr. Justice Stevens as "providing another with material which he has a constitutional right to possess. See *Stanley v. Georgia*, 394 U.S. 557." *Marks v. United States*, U.S. (Stevens, J., concurring and dissenting). It is just for this conduct that Petitioner has been sentenced to a year of imprisonment. The Court is respectfully urged to reconsider such consequences are constitutionally permissible or whether, as a matter of law, all "community standards" in this country must contain an element of tolerance reflecting the values of the First Amendment.

If, as the First Amendment indicates, our entire governmental system is predicated upon a preference toward testing ideas in the market place rather than the courtroom,

the necessary presence of this element in all local community standards leads to the inescapable conclusion that Petitioner here cannot stand convicted of a crime. As Mr. Justice Douglas stated in *Paris Adult Theatre I v. Slaton, supra*:

> "Our society – unlike most in the world – presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world." 413 U.S., at 73 (Douglas, J. dissenting).

With a view toward alleviating the present institutional strain upon the judiciary and with the further view of reaffirming that "article of faith that sets us apart from most nations in the world," the Court is respectfully urged to consider whether Petitioner may be constitutionally imprisoned for the conduct in which he has engaged. If that possibility is found to exist, the Court is urged to find that the motion picture film, in the circumstances in which it was shown, cannot, as a matter of applicable constitutional law, be held obscene.

CONCLUSION

For all of the above reasons Petitioner's conviction should be reversed.

Respectfully submitted,

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